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Nos. 618, 676, 704, 743

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In the Supreme Court of the United States,

OCTOBER TERM, 1930

UNITED STATES OF AMERICA EX REL. ETHEL M. McLENNAN, PETITIONER,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

UNITED STATES OF AMERICA EX REL. W. B. PYRON, PETITIONER

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, AND CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA EX REL. ETHEL M. McLennan, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

No. 676

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office

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No. 704

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

No. 743

UNITED STATES OF AMERICA EX REL. W. B. PYRON, petitioner

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and Charles C. Moore, Commissioner of the General Land Office

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ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia are not reported. They may be found in the respective records as follows: in No. 676 (Simpson) at page 21; in No. 704 (Barton) at pages 20–22; in No. 743 (Pyron) at pages 25–27. The opinion in No. 743 also applies to No. 618 (McLennan). The opinion of the Court of Appeals of the District of Columbia in No. 704 (R. 25–39) is reported in 46 F. (2d) 217. The memorandum opinion of the Court of Appeals in Nos. 618 (R. 17, 18) 676 (R. 27, 28), and 743 (R. 35, 36) is reported in 46 F. (2d) 224.

JURISDICTION

The judgments of the Court of Appeals sought to be reviewed were entered December 1, 1930. (No. 618, R. 18–19; No. 676, R. 28–29; No. 704, R. 39;

No. 743, R. 42.) Petitions for certiorari in all four cases were granted by this Court on March 2, 1931. (No. 618, R. 40; No. 676, R. 44; No. 704, R. 41; No. 743, R. 53.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioners filed or sought to file applications for permits to prospect for oil on lands owned by the United States, under Section 13 of the Act of February 25, 1920 (41 Stat. 437). The Secretary of the Interior rejected or refused to receive these applications in pursuance of a policy initiated by the President to conserve Government oil completely in this administration, and this practice has been consistently adhered to by the Secretary. These cases present the question whether the Secretary should be compelled by writs of mandamus to reinstate or receive these applications "and to proceed therewith according to law."

STATUTES, REGULATIONS, AND DEPARTMENTAL ORDERS INVOLVED

These are set forth in Appendix A, pp. 45–55, *infra*.

STATEMENT

The petitioners filed petitions in the Supreme Court of the District of Columbia for writs of mandamus to compel the Secretary of the Interior [1]

[1] In Nos. 676 and 743 the Commissioner of the General Land Office was also made a party defendant.

(1) to receive, or to reinstate, the applications of the petitioners for permits to prospect for oil and gas upon specified portions of the public domain in California and New Mexico, under the Leasing Act of February 25, 1920, pp. 45–49, *infra,* and (2) to compel the Secretary to issue such permits to the petitioners. (No. 618, R. 1–9; No. 676, R. 1–13; No. 704, R. 1–15; No. 743, R. 1–17.) Rules to show cause were issued and answers to the petitions were filed by the Secretary. (No. 618, R. 9–12; No. 676, R. 13–20; No. 704, R. 15–19; No. 743, R. 17–25.) After hearings upon the pleadings,[2] the Supreme Court of the District entered an order in each case directing that a writ of mandamus issue commanding the Secretary to accept for filing (or to reinstate) the application or applications of the petitioner and to "proceed therewith according to law." The court did not order the Secretary to *issue* the permits and the petitioners did not appeal from the judgments. (No. 618, R. 12; No. 676, R. 22; No. 704, R. 22; No. 743, R. 28.) Upon appeal of the respondents, the Court of Appeals of the District of Columbia reversed the judgments of the Supreme Court of the District. (No. 618, R. 18; No. 676, R. 27–28; No. 704, R. 39; No. 743, R. 50.)

The petition filed in the Supreme Court of the District in No. 618, the *McLennan case,* alleges

[2] In No. 676 the petitioner filed a demurrer to the answer (R. 21), and the hearing was upon the petition, answer, and demurrer (R. 22). In No. 743 the hearing was upon the petition and answer, upon oral evidence introduced by the petitioner, and a written waiver of trial by jury. (R. 28.)

in substance: That the petitioner is a citizen of the United States and a resident of California (R. 1); that on October 29, 1928, pursuant to the Act of February 25, 1920, she filed with the Register of the Land Office at Sacramento, California, an application for a permit to prospect for oil and gas upon a certain designated portion of the United States public domain in California; that this application was in proper form and complied with all the requirements of the law and regulations of the Interior Department with respect to such applications (R. 2–3); that on the same day another and conflicting application for a permit was filed by another applicant with respect to the same land, whereupon a drawing was held on October 29, 1928, by the register of the local land office, pursuant to regulations of the Department of the Interior, in which drawing the name of the petitioner was the one first drawn; that under date of November 7, 1928, the Commissioner of the General Land Office at Washington was so advised (R. 3); that on March 13, 1929, the following telegram, signed by the Commissioner of the General Land Office, and approved by the Secretary of the Interior, was sent to the various United States land offices:

> No oil and gas prospecting permits will be issued on or after March twelfth, nineteen twenty-nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked.

That petition also avers that on the same day the Department of the Interior released a memorandum for the press which stated that the Secretary of the Interior and the Commissioner had sent instructions to all local land officers to the effect that they were not to receive applications for permits to prospect for oil and gas on the public domain and were to reject all pending applications, and further stating that these instructions were "in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration' " (R. 3–4); that on March 26, 1929, the petitioner was notified by the General Land Office that, pursuant to the instructions of the Secretary of the Interior of March 13, 1929, and in accordance with departmental order No. 337, of March 16, 1929, her application was rejected; that the petitioner is duly qualified under the law to receive the permit for which she applied, and has at all times been ready, able, and willing to comply with all lawful regulations of the Secretary of the Interior with respect thereto; that the issuance of such permit under the statute to a qualified applicant is purely a ministerial duty imposed by law upon the Secretary; that the action of the Secretary in denying the permit to the petitioner was arbitrary, confiscatory, and illegal (R. 6). Various sections of the Leasing Act of February 25, 1920,

are set forth in the petition, together with parts of the press memoranda and departmental orders therein referred to. (R. 6–7.)

The answer of the Secretary of the Interior admits substantially all the allegations of fact in the petition, but denies the allegations of law. (No. 618, R. 9–11.) It asserts authority to reject the application and alleges that under the Act of February 25, 1920, discretion was reposed in the Secretary "either to issue or decline to issue prospecting permits." (R. 618, R. 9–11.)

The petitions and answers in the other three cases are similar in substance. In Nos. 676 (Simpson) and 743 (Pyron) the applications for prospecting permits were filed subsequent to the executive and departmental orders and notices of March, 1929. (No. 676, R. 2, 5, 6; No. 743, R. 6.) The petition in No. 704 (Barton) contained an allegation that upon the filing of his application the petitioner acquired a vested right to the permit sought, and that the denial of the application by the Secretary was a taking of the petitioner's property without due process of law. (R. 10–11.) The answer of the Secretary and the Commissioner in No. 676 (Simpson) contained an additional allegation that the effect of the departmental and executive orders and notices of March, 1929, was to cause all public lands containing oil to be temporarily withdrawn from exploration for oil and gas under the Act of February 25, 1920. (R. 17.)

The action of the Supreme Court of the District of Columbia in directing the issuing of the writs of mandamus was based upon the assumption that the discretion vested in the Secretary of the Interior under Section 13 of the Leasing Act was a "judicial" discretion and not an "absolute" discretion, and the Secretary was not empowered by the statute to refuse to grant any permits at all and thus suspend the operation of the statute. The Supreme Court of the District also held that the action of the Secretary in March, 1929, did not amount to a withdrawal of the public domain from the operation of the Leasing Act under the Withdrawal Act of 1910 (pp. 49–50, *infra*). (No. 704, R. 20–22; No. 743, R. 25–27.) The Court of Appeals of the District of Columbia, with Mr. Justice Van Orsdel dissenting, reversed the judgments of the Supreme Court of the District on the ground that the action of the President and the Secretary of the Interior in March, 1929, amounted to a withdrawal of the public domain from exploration for oil and gas under the Leasing Act; that the rights of applicants for permits to prospect for oil and gas were subject to the executive authority to withdraw the land; that under these circumstances the rejection of the applications of the petitioners or the refusal to receive the same was a valid exercise of that power. (No. 618, R. 19–32; No. 676, R. 29–42; No. 704, R. 25–39; No. 743, R. 36–50.)

SUMMARY OF ARGUMENT

I

The Leasing Act of 1920 should be construed to give the Secretary of the Interior the power to decline to issue any permits to prospect for oil on public land whenever, in the exercise of reasonable discretion, it appears to him that it is in the public interest to issue no such permits.

A citizen has no vested right to enter upon the public lands to prospect for oil. The United States, as the owner of these lands and as sovereign over the property belonging to it, has the complete right to limit the use of these lands as it may desire, and since March 3, 1849, it has charged the Secretary of the Interior with supervision of the public lands. He should be regarded as having the power which an agent of a proprietor of real estate ordinarily has in regard to its management, unless some specific provision commands him to act in a certain way.

The Act of 1920 does not specifically direct the Secretary to issue permits to prospect for oil. It provides that oil lands "shall be subject to disposition in the form and manner provided by this Act" and merely authorizes the Secretary to grant prospecting permits under certain circumstances. The word "authorize" is not ordinarily mandatory. That it was not used in the phrase in question as mandatory is indicated by comparison of that phrase with certain other provisions of the Act which are clearly mandatory.

If the construction of the Act for which we contend is correct, the Secretary can not be compelled by mandamus to issue permits to the petitioners. It is elementary that the courts will not require such an executive officer to disaffirm a decision which he has made in the exercise of his judgment. There is no showing here that the Secretary acted arbitrarily.

II

Even if the Act of 1920 should be construed to direct the Secretary of the Interior to issue such permits, his duty to do so was terminated by the withdrawal of the lands in question by the President.

Within a few days after his inauguration in 1929, the President issued a statement that there would be a complete conservation of Government oil in his administration, and in pursuance of this policy the Secretary of the Interior immediately notified land offices that no prospecting permits should be issued. The rejections of the applications were made in pursuance of this policy and have been acquiesced in by the President and by Congress.

Prior to the passage of the Withdrawal Act of June 25, 1910, it was held that the President might, even in the absence of statutory authority, temporarily for public purposes withdraw public lands of the United States from the operation of an Act of Congress. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. As the Act of 1910 did not expressly abrogate the power which existed previous to that

time, such power would seem to be still existent, and the withdrawal in question would seem to be justified under the power which the President had in the absence of statute.

Anyway, authority to make such a withdrawal is expressly reposed in the President by the Withdrawal Act of June 25, 1910. The fact that the President did not make a formal proclamation would seem not to be fatal, as it has been held that it is sufficient if the action of the President "has such publicity as accomplishes the end to be attained." The fact that it does not appear, except inferentially, that the President acted directly is immaterial, as the act of a Cabinet officer is presumed to be done at the direction of the President.

The petitioners object that the withdrawal was invalid because it was not "for a temporary purpose," and that it was not "for a public purpose," as required by the Act; that the Act permitting withdrawal from "settlement, location, sale, or *entry*" does not apply to permits to prospect for oil, and also because no report of the withdrawal was made to Congress. We submit that none of these objections is fatal.

If the action of the President and the Secretary constituted a withdrawal, the mere filing of an application for a permit prior to the withdrawal, and *a fortiori* the filing of an application for a permit subsequent thereto, can not defeat the purpose of the withdrawal, as it can not create any vested right against the United States.

The action of the President and the Secretary of the Interior was intended to meet an emergency caused by a great overproduction of oil and gas and the waste incident thereto. The President was in a position to know when the public interests required the lands to be withdrawn. In view of these facts, the rejection of applications by the Secretary ought not to be regarded as unlawful merely because of the failure to meet any technical requirements in the statute or because the President or Secretary mistook the source of their authority. A writ of mandamus ought not to be issued to compel the performance of an act which will work public mischief.

The briefs filed in support of numerous States require no answer, inasmuch as the rights of the States to royalties do not accrue until something is earned and received by the United States.

ARGUMENT

I

THE LEASING ACT OF 1920 SHOULD BE CONSTRUED TO GIVE THE SECRETARY OF THE INTERIOR THE POWER TO DECLINE TO ISSUE ANY PERMITS TO PROSPECT FOR OIL ON PUBLIC LANDS WHENEVER IN THE EXERCISE OF REASONABLE DISCRETION IT APPEARS TO HIM THAT IT IS IN THE PUBLIC INTEREST TO ISSUE NO SUCH PERMITS

In order to understand the force and effect of the Leasing Act of 1920, it is desirable to consider previous legislation.

The General Mining Laws passed in 1872, and embodied in Sections 2319 *et seq.* of the Revised Statutes, declared all valuable mineral deposits in lands of the United States free to exploration and purchase, and the lands in which they were found free to occupation and purchase by citizens. They provided the form and method of location. They stipulated that no location should be made before the discovery of minerals within the limits of the claim involved. No other authority was required to permit a citizen to go upon the public domain, explore for and find minerals, locate his claim or claims, extract the minerals therefrom, or sell or dispose of the property. By going upon the public property when he chose, staking his claim, and taking other formal steps he acquired the property. As this Court said in *Wilbur* v. *Krushnic*, 280 U. S. 306, 314:

> The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease.

The Act of February 25, 1920, c. 85, 41 Stat. 437 (pp. 45–49, *infra*), which is entitled "An Act To promote the mining of coal, phosphate, oil, oil shale, or gas, and sodium on the public domain," provides:

> That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States [with certain exclusions not here material]

> shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation [with certain provisos].

Then follow 37 other sections. Separate provisions are made in respect of different kinds of deposits. Sections 13 to 20 relate solely to oil and gas. Section 13 provides that the Secretary of the Interior

> is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *.

Then follow certain conditions which the permittee is required to observe and a provision that the

> applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; * * *

This section further provides that if the applicant shall erect certain monuments and notices at or near the monuments,

> he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified.

Then follow provisions requiring the marking of the corners of the tract described in the permit, after receiving the permit, and certain provisos.

Section 14 provides:

> That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit,

with certain provisos and additional provisions. The section further stipulates that—

> Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre * * *.

Section 15 provides that until the permittee shall apply for a lease he shall pay to the United States 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition.

Other sections provide for restrictions on drilling, forfeiture for violations of the permit or lease, leases of unappropriated deposits, and other matters.

The petitioners construe the Act of February 25, 1920, as requiring the Secretary under all circumstances and at all times to issue permits to proper persons to prospect for oil and gas on the pub-

lic domain. This construction evidently was adopted by the Supreme Court of the District in the instant cases. See also *West* v. *United States ex rel. Alling,* 58 App. D. C. 329, 30 F. (2d) 739. We maintain, however, that the Act should not be construed so narrowly, but that it must be construed as reposing in the Secretary the right to refuse to issue any permits whenever in the reasonable exercise of discretion he deems it for the public interest to issue no permits.

Apart from this Act, a citizen has, of course, no vested right to enter upon the public lands to prospect for oil. The United States, as the owner of these lands and as sovereign over the property belonging to it, has the complete right to limit the use of the lands in such manner as it may desire. *United States* v. *Grimaud,* 220 U. S. 506; *Light* v. *United States,* 220 U. S. 523; *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126; *Camfield* v. *United States,* 167 U. S. 518, 524; *Knight* v. *Association,* 142 U. S. 161; *Williams* v. *United States,* 138 U. S. 514, 524. Since March 3, 1849, the Secretary of the Interior has been charged by statute with supervision of the public lands. Section 441, R. S.

The authorities cited indicate that discretionary powers granted to the Secretary of the Interior "as guardian of the people of the United States over the public lands" are not to be so narrowly construed as are similar grants to ministerial officers or representatives. Unless the Leasing

Act of February 25, 1920, specifically requires him to issue permits even against his best judgment of what the public interest requires, it would seem that the Secretary should be regarded as having the power which an agent of a proprietor of real estate ordinarily has in regard to its management and that he should have the power to conserve the property of the Government.[3] The Act of 1920 does not specifically direct the Secretary to issue permits to prospect for oil. Although its general policy is to promote the mining of oil on the public domain, it provides that oil lands "shall be subject to disposition *in the form and manner provided by this Act,*" and Section 13 of the Act merely *authorizes* the Secretary to grant prospecting permits under certain circumstances. The usual meaning of the word "authorize" is "to confer authority upon; empower; commission",[4] and

[3] It is a matter of common knowledge that long prior to the enactment of the Oil Leasing Act predictions had been made that the oil supply of the United States would become exhausted to the detriment of the national defense and of the common welfare. Three naval reserves had been created by Executive order to conserve, if possible, a supply of oil in the ground for the future needs of the United States Navy. Laws had been passed by numerous States to prevent the waste of oil and gas in mining operations. There had been in the United States periods of overproduction of oil. Congress must have known these facts.

[4] See New Standard Dictionary; *County of Lehigh* v. *Hoffort*, 116 Pa. St. 119; *Pittman* v. *Road Improvement District*, 147 Ark. 87; *Klinck* v. *Pounds*, 163 N. Y. Supp. 1009.

Congress ordinarily uses the word "authorize" in this permissive sense.[5]

An examination of the rest of the Act indicates that the word "authorize" is used in the permissive sense. Thus Section 2, relating to coal lands, provides:

> That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant *shall*, divide any of the coal lands * * *. (Italics ours.)

In Section 17, dealing with proven oil and gas lands not covered by prior claims or right, it is provided that such lands "may be leased" by the Secretary. In Section 18a, dealing with public lands containing oil or gas covered by claims, the validity of which were being questioned either in

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[5] For example, it is the practice to *authorize* appropriations to be made. Such acts do not make the appropriation, nor do they impose the duty of subsequently making the appropriation. They are mere authorizations to be carried out later by specific appropriations if Congress deems the same advisable. See Act of May 16, 1928, c. 583, 45 Stat. 590; Act of April 28, 1924, c. 134, 43 Stat. 111. The word "authorize" in Acts relating to corporations, private individuals, and municipalities is often used in a permissive sense; for example, in the Act of May 25, 1920, c. 197, 41 Stat. 621, whereby certain railroad companies are *authorized* to convey lands, and the Act of August 7, 1919, c. 35, 41 Stat. 275, where a county is *authorized* to construct a bridge. On the other hand, where Congress desires to make a mandatory direction, it is common practice to use the words "authorized and directed." See Act of October 30, 1918, c. 198, 40 Stat. 1018; Act of March 4, 1921, c. 155, 41 Stat. 1364; Act of August 25, 1919, c. 52, 41 Stat. 281; and Act of May 16, 1928, c. 585, 45 Stat. 590.

the Department or in the courts, the President is "authorized" to direct the compromise and settlement of such controversies. On the other hand, in dealing with those oil and gas lands where legal rights or equities arising from substantial expenditures had arisen under the general mining or other laws prior to the passage of the Leasing Act, Congress used mandatory language. In Section 18, which dealt with claims initiated under the General Mining Laws prior to certain dates and where claimants had, through expenditure of time and money, brought in producing oil wells, Congress provides that upon an appropriate showing and a surrender of the mining title the locator or his successors in interest "shall be entitled to a lease." In Section 19, dealing also with mining locations upon which money had been expended and labor performed, it is provided that the claimants "shall be entitled to prospecting permits thereon upon the same terms and conditions and limitations as to acreage as other permits provided for in this Act." In Section 22, dealing with prior existing mining claims in Alaska, where substantial improvements had been made, it was provided that upon surrender of the mining claims the claimants "shall be entitled" to a lease or leases. Also in Section 14 of the Act, which deals with the reward to the prospector who, after having been granted a prospecting permit by the Secretary of the Interior, lawfully goes upon the land, expends

his time and money, and proves to the satisfaction of the Secretary of the Interior that he has discovered valuable deposits of oil or gas, it is provided that he "shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit." So, it appears that Congress commanded the issuance of leases to persons on the public domain who had prior rights and equities; but, as to persons who had no such rights or equities and who came in after the passage of the Leasing Act to seek the privilege of exploring the public domain, Congress vested in the Secretary of the Interior a discretion to grant or to refuse to grant such a license.

Section 30 of the Leasing Act provides that each lease "shall contain provisions * * * for the protection of the interests of the United States * * * for the safeguarding of the public welfare," and "to insure the sale of production of such leased lands to the United States and to the public at reasonable prices." (See Section 2, Clauses (d) and (h), and Section 3, Clause (d), approved form of lease as provided by G. L. O. Circular 672, par. 17.) These provisions have been construed to permit the exercise of discretion by the Secretary of the Interior, after the discovery of oil and during its production, to supervise the fixing of the selling price and partially or entirely to cut off further production under jus-

tification. See *Wilbur* v. *Texas Co.*, 40 F. (2d) 787 (Ct. App. D. C.), construing this Act.

The language used with reference to sodium in Section 23 is in marked contrast to that relating to oil lands in Section 13. Section 23 provides:

> That the Secretary of the Interior is hereby *authorized and directed*, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, etc. (Italics ours.)

If Congress had intended to invest every applicant with the right to require the issuance of a permit, it would seem that the same word, "directed," would have been used with reference to oil and gas.

The opinion of the Supreme Court of the District states (No. 618, R. 36):

> That the use of the words "is authorized" above does not necessarily vest him with such discretion as is claimed by him, is shown by the use of the same expression in section 32 of the act of 1920, where it is clearly mandatory.

We submit, however, that this section, which relates to the making of rules and regulations, throws no light upon the question.

The precise question in the instant cases seems never to have arisen in practice under the Act

of 1920 until the action complained of in the instant cases. But some indication that the Act was construed from the outset by the Secretary of the Interior in accordance with our contentions here is found in the second paragraph of the rules and regulations issued on March 11, 1920, under the Act, which reads:

> It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.

It is contended that the Secretary's announcement in advance that no permits would be granted was an arbitrary refusal to exercise his discretion. The fallacy in this contention lies in the failure to recognize that the statute can not be construed as grantinng a discretion merely to consider the individual qualifications of applicants for permits, or as imposing a duty to grant permits to all suitable persons who may wish to prospect for oil upon the public land and to obtain a vested interest therein. If the statute be given an interpretation adequate to the accomplishment of its purpose to protect and conserve the natural resources of the United States, the Secretary was required, in the exercise of his discretion, to look beyond individual qualifications to the public interest and to consider

primarily the conservation and economic development of such resources. If, as we contend, the Secretary's discretion extended so far, then it was his duty to consider the facts stated by the President and such other facts as might properly influence his judgment, to determine whether prospecting permits could be issued without exhaustion and waste of oil deposits upon the public land, and, under proper circumstances, to refuse to issue any permits for the further exploitation of these resources.

The controlling question is one of construction as to the breadth and scope of the discretion imposed in the Secretary. We submit that a reasonable exercise of the Secretary's discretion includes more than a mere consideration of individual applications, and involves the public duty of refusing permits in order to prevent exhaustion and waste of natural resources. If we are right in this contention, the Secretary's action in this case was the fulfilment of a plain duty imposed by the statute.

The orders of the Secretary here complained of were made in March, 1929. During two regular sessions and one special session, Congress has acquiesced in the action of the Secretary. While this period of acquiescence is comparatively short, the scope and effect of the Secretary's action was so extensive that it can not have passed unnoticed. The presence of five States at the Bar of this Court in support of the petition for certiorari, because of

the importance to them of the orders of the Secretary, indicates that his action was of sufficient importance not to have been overlooked by the representatives of these and other States in the House of Representatives and in the Senate of the United States. Such tacit acquiescence, in a matter of such grave importance, must, we submit, be taken in recognition of the validity of the Secretary's orders.

II

THE ACTION OF THE PRESIDENT AND THE SECRETARY OF THE INTERIOR IN MARCH, 1929, AMOUNTED TO A WITHDRAWAL OF THE PUBLIC DOMAIN FROM THE OPERATION OF THE OIL AND GAS PROVISIONS OF THE LEASING ACT OF 1920, AND THE SECRETARY WAS THEREFORE WARRANTED IN REJECTING AND REFUSING TO CONSIDER THE PETITIONERS' APPLICATIONS FOR PROSPECTING PERMITS

Even if the Leasing Act of 1920 must be construed as containing mandatory directions to the Secretary of the Interior to issue permits to prospect on oil lands to qualified applicants, we contend that in 1929 he acquired the right to reject all permits by virtue of what amounted to a withdrawal by the President of the oil lands from the operation of the Leasing Act of 1920.

On March 12, 1929, in an informal statement to the press, the President of the United States said (No. 618, R. 4; No. 676, R. 17):

> there will be complete conservation of Government oil in this administration. * * *

On March 13, 1929, the following telegram was sent by the Secretary of the Interior to the various United States land offices (No. 618, R. 3; No. 704, R. 5):

> No oil and gas prospecting permits will be issued on and after March twelfth, nineteen twenty-nine. Stop. Reject all applications for oil and gas permits now pending in your office and receive no more. Stop. All orders for drawings hereby revoked.

On the same day the Department of the Interior released a memorandum for the press, which reads in part as follows (No. 618, R. 3–4; No. 704, R. 5–6):

> Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.
>
> These instructions are in accordance with the statement issued at the White House yesterday to the effect that "there will be complete conservation of Government oil in this administration."

* * * * *

On March 16, 1929, a formal order, designated "Order No. 337" (Appendix A, pp. 51–52, *infra*), was issued by the Secretary of the Interior, reading

in part as follows (No. 618, R. 4, 5; No. 676, R. 17, 18–19; No. 704, R. 7–8, 12, 16; No. 743, R. 22–23):

> The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.
>
> There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.
>
> * * * * *
>
> No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

This order was published generally in the public press. (No. 618, R. 4–5; No. 704, R. 7–9.)

On March 20, 1929, another formal order, known as "Order No. 338" (Appendix A, pp. 53–55, *infra*), was issued by the Secretary, reading in part as follows (No. 676, R. 3, 6, 7, 17, 18; No. 743, R. 6, 11, 21, 23–25):

> The following outlines the general procedure in the Department of the Interior

for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

* * * * *

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

* * * * *

It was pursuant to the foregoing orders and notices that the Secretary of the Interior rejected, or refused to receive, the petitioners' applications for permits to prospect for oil and gas under the Leasing Act. The Government contends, as held by the Court of Appeals, that the above-described action of the President and Secretary in March, 1929, amounted to a withdrawal of the public lands here involved from the operation of the oil and gas provisions of the Leasing Act and that by virtue thereof the Secretary was justified in rejecting or refusing to receive the petitioners' applications for prospecting permits. We maintain that the President had the power to withdraw the lands (1) entirely apart from any statutory authority, and

(2) by virtue of the express provisions of the Act of June 25, 1910.

(1) Prior to the passage of the Act of 1910 it had been held that the President might, in the absence of statutory authority, temporarily, for public purposes, withdraw public lands of the United States from the operation of an Act of Congress. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. In that case this Court said that the practice of withdrawal of public lands, both mineral and non-mineral, from private appropriation, by the President without special authority from Congress dates from an early period in the history of the country, and that the power as exercised had never been repudiated by Congress. We are aware of no case which has discussed the power of the President to make such withdrawals since the passage of the Act of 1910. That Act, however, nowhere expressly provides that the power which the President previously had should be abrogated or restricted. It is true that this Court in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 482–483, said:

> The majority [of the Senate committee], after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the courts, reported that the President already had a general power of withdrawal and recommended the passage of the pending bill *inasmuch as it operated to restrict the greater power* already possessed. Sen. Rep. 171 (61st Cong., 2d Session. * * * (Italics ours.)

But we submit that it is at least doubtful whether that part of the language of the Court which we have italicized, and which was unnecessary to the decision, is fully justified by the legislative reports. See extracts from the Reports of the Committee in question, which are appended in Appendix C, at pp. 57–58, *infra*.

(2) Anyway, authority to make such a withdrawal is expressly reposed in the President by the Act of June 25, 1910, pp. 49–50, *infra*, known as the Withdrawal Act. This Act provides:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.
>
> * * * * *
>
> SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

By virtue of this statute it seems clear that the President is empowered, in aid of any proper "public purpose," to withdraw temporarily from exploration under the Act of February 25, 1920, all or any such portion of the public domain as in

his discretion may seem desirable. It is true that in the instant case no formal withdrawal proclamation was made by the President. But the statute does not provide any particular form or method to be followed in making a withdrawal and it would seem that any document or method which shows with clearness the executive intent to make a withdrawal and the purpose thereof would satisfy the statute. Here the object and purpose of the President and Secretary in issuing the order and notices in question were clear, and the obvious intention motivating these orders and announcements was to withdraw all public lands, except those specified, from the operation of the oil and gas provisions of the Leasing Act. Under these circumstances we submit that the withdrawal was effective even though no formal proclamation was issued. The decisions of this Court seem to sustain this conclusion.

Wilcox v. *Jackson*, 13 Pet. 498, involved the question whether a tract of land embracing the Fort Dearborn military post had been exempted from public preemption under the Act of 1830. That Act provided "that no entry or sale of any land shall be made" "which is reserved from sale * * * by order of the President, or which may have been appropriated, for any purpose whatsoever." The land in question had been set aside as a military reservation *by the Secretary of War* and had been so used from time to time. In hold-

ing that the land in question had been reserved from sale by "order of the President," this Court said (p. 512):

> Now, although the immediate agent, in requiring this reservation, was the secretary of war, yet we feel justified in presuming, that it was done by the approbation and direction by the president. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence, we consider the act of the war department, in requiring this reservation to be made, as being in legal contemplation the act of the president; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the act of Congress.

In *Wolsey* v. *Chapman*, 101 U. S. 755, the question was whether certain lands on the Des Moines River were subject to selection by the State of Iowa as forming part of a Federal grant, where previously the lands in question were withheld from sale by order of the Interior Department pending action by Congress with respect to various claims in connection with this land. The case involved Section 10 of the Act of September 4, 1841, providing that "no lands included in any reservation, by * * * proclamation of the President

* * * shall be liable to entry, etc." In that case this Court said (pp. 768, 770):

> The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, *notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.*
>
> * * * * *
>
> A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. *No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained.* If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have

> been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox* v. *Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act. (Italics ours.)

In *Wood* v. *Beach*, 156 U. S. 548, *Wolsey* v. *Chapman, supra,* was approved, and public lands withdrawn from entry and sale by the Interior Department in aid of certain railroad grants were held validly withdrawn.

In *Northern Pacific Railway Co.* v. *Wismer*, 246 U. S. 283, certain lands had been set aside for certain Indians under the direction of the Commissioner of Indian Affairs with a view to the establistment of a permanent reservation. The lands in question were held to have been validly withdrawn although no formal withdrawal order was issued by the Interior Department.

See also *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Northern Pacific R. Co.* v. *Musser-Sauntry Co.*, 168 U. S. 604, 607.

The language used in the withdrawal statutes which were involved in the foregoing cases is similar to that used in the Withdrawal Act of 1910.

In view of the doctrine repeatedly enunciated by this Court that no particular form of proclamation by the President is required for a withdrawal and that it is sufficient if the action of the President "has such publicity as accomplishes the end to be obtained," we submit that the action of the President and Secretary of the Interior in March, 1929, in the instant case amounted to a withdrawal under the Act of 1910.

In the briefs of the petitioners in support of their petitions for certiorari, numerous objections are advanced against the foregoing contention. We submit that these objections are without merit.

It is contended that the Act of 1910 contemplated a withdrawal by the *President* and that in the instant case no formal order or proclamation was issued *by the President*. But the cases cited demonstrate that the act of the head of an executive department is the act of the President; that in all cases, save where the President is required to act judicially, the act of a Cabinet officer is presumed to be at the direction of the President. *Wilcox* v. *Jackson, supra,* 13 Pet. 498, 512; *Wood* v. *Beach, supra,* 156 U. S. 548, 550; *Wolsey* v. *Chapman, supra,* 101 U. S. 755, 769; *Jones* v. *United States,* 137 U. S. 202, 217; *United States* v. *Midwest Oil Co.,* 236 U. S. 459; *United States* v. *Morrison,* 240 U. S. 192, 212; *Chicago, etc. Ry.* v. *United States,* 244 U. S. 351, 357; *Maresca et al.* v. *United States,* 277 Fed. 727 (C. C. A. 2d) certiorari denied, 257 U. S. 657;

7 Ops. A. G. 453. The application of the rule of these cases to the instant case would seem to follow as a matter of course in view of the press notices issued by the President just prior to the issuance of the order of March 13, 1929, by the Secretary.

The petitioners further contend that under the Act of 1910 a withdrawal must be for a "temporary" purpose and that the present withdrawal was not a temporary one. But any withdrawal under the Act would seem to be "temporary," since the Act provides that it shall remain in force until revoked by the President or an Act of Congress. The statement of the Secretary to the press, issued simultaneously with his order of March 13, 1929, specifically stated that the order was pursuant to the statement issued on the previous day by the President that "there will be complete conservation of Government oil *in this administration.*" The policy of the administration is, of course, subject to change at any time. Moreover, it seems clear that the word "temporarily" was inserted in the Act only for the purpose of making it clear that the lands withdrawn would again be available for entry, sale, etc., when in the opinion of the President or Congress the purpose for which the lands were withdrawn had been accomplished. (See Cong. Rec., Vol. 45, 61st Cong., 2d Sess., p. 8170.)

The petitioners maintain that the instant case does not fall within the provision of the 1910 Act, which limits the reservation or withdrawal of pub-

lic lands "for water-power sites, irrigation, classification of lands, *or other public purposes.*" Since the acts of the Secretary and President were specifically in aid of the conservation of the Government's oil and gas resources and to meet a public emergency created by the overproduction of oil and gas, it seems patent that a "public purpose" is involved. Moreover, this contention of the petitioners is completely answered by the case of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. That case involved a withdrawal of extensive areas of public land by President Taft for the purpose of assuring the conservation of a proper supply of petroleum for the Government's own use and pending the enactment of further legislation on the subject. This withdrawal was made prior to the passage of the Act of 1910, although the case was decided by the Supreme Court subsequent to its enactment. The Supreme Court held that the President possessed power to make the withdrawal.

It is further contended by the petitioners that the Act of 1910 applies only to a withdrawal of the public domain from "settlement, location, sale, or *entry*" and that an application for a permit to prospect for oil and gas under the Leasing Act does not fall within the language quoted. When the Act of 1910 was enacted there was nothing in existence precisely similar to a permit to prospect for oil and gas. But upon the general principal that the greater includes the lesser, it seems

clear that a withdrawal from "settlement, location, sale, or entry" would include a withdrawal from the operation of the oil and gas sections of the Leasing Act. Annually since 1920 there have been withdrawals of public lands from the operation of the Leasing Act based upon the Act of 1910. (See, for example, the Annual Report of the Secretary of the Interior, 1930, p. 55.)

Moreover, the legislative history of the Leasing Act negatives the contention of the petitioners. Representative Mondell of the Public Lands Committee, in explaining the Bill on the floor of the House, said, with respect to the words in question, "The words used include every method whereby public lands are acquired—location, settlement, filing, and entry—sale being a form of entry, entry by sale," and further, "it gives him [the President] the power to withdraw public lands from all forms of entry at any time." (Cong. Rec., Vol. 45, 61st Cong., 2d sess., pp. 5094, 8667, 8673.)

The petitioners assert that the acts in question do not constitute a withdrawal of public lands under the Act of 1910 because no report of such withdrawal was made to Congress as required under Section 3 of the 1910 Act, which provides "that the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (P. 29, *supra*.) We submit that the provision in the Withdrawal Act requiring a report

to Congress of withdrawals made by the President has no direct bearing on the question of what constitutes a withdrawal under the statute. The distinction between making a withdrawal and reporting the same to Congress is an obvious one. Since the statute requires a report only at the next regular session of Congress it is clear that a withdrawal order must often be in effect many months before any report thereof is required. The reporting of the withdrawal to Congress can not be regarded as an essential part of the withdrawal itself. The clear purpose of the provision in question is to inform Congress of the executive action. Here, in view of the numerous announcements to the press and the great general interest and publicity which the matter has aroused, it is inconceivable that Congress did not know about the action taken. It has been held that a direction in a statute to report certain executive action to Congress is only directory. *Buchanan* v. *United States,* 28 C. Cls. 127, 132.

If the action of the President and the Secretary in March, 1929, constituted a withdrawal of the public lands in question from the operation of the oil and gas provisions of the Leasing Act, then the mere filing prior thereto (and *a fortiori* the filing subsequent thereto) of an application for a permit to prospect for oil and gas may not defeat the effect or purpose of such withdrawal.

The prospecting permit provided for in Section 13 of the Leasing Act is in the nature of a license which, within the limits of the discretion contemplated by the statute, may be granted or denied by the executive authority. The permit may or may not ripen into a lease, but until the permit is granted no right in the property, legal or equitable, vests or exists in the applicant. It is well settled that mere applications to purchase public lands, or to enter upon the same, or undetermined claims to public lands, or any form of entry thereon which does not amount to a vested right, does not, as between the United States and the claimant, create any obstacle to the full exercise of ownership by the United States. *Frisbie* v. *Whitney,* 9 Wall. 187; the *Yosemite Valley Case,* 15 Wall. 77, 94; *Shepley* v. *Cowan,* 91 U. S. 330; *Campbell* v. *Wade,* 132 U. S. 34.

Under the law as it existed prior to the 1920 Act, this Court said in *Campbell* v. *Wade, supra* (p. 37):

> The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by

> occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held *that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States,* which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. (Italics ours.)

Under the foregoing cases it is clear that the petitioners acquired no vested right in the public domain by the mere filing of applications for prospecting permits under the Leasing Act and, therefore, upon withdrawal of the public domain from the operation of the oil and gas provisions of that Act the Secretary was warranted in rejecting and refusing to consider the petitioners' applications.

As pointed out in the opinion of the Court of Appeals, the orders and notices of the President and Secretary of the Interior in March, 1929, were intended to meet an emergency "occasioned by the great overproduction of oil and gas, the waste incident thereto, and other public considerations." (No. 618, R. 27.) The situation is accurately described by the statement of this Court in the *Midwest case,* 236 U. S. 459, 471:

> The President was in a position to know when the public interest required particular

portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.

Although mandamus is a legal remedy, its issuance is largely determined and controlled by equitable principles. It is awarded in the exercise of a sound judicial discretion "to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law, but in disregard of its spirit." *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311–312; *Ex parte Skinner & Eddy Corp.* v. *United States,* 265 U. S. 86; *Work* v. *Rives,* 267 U. S. 175.

The States of Utah, New Mexico, Colorado, Wyoming, and Montana asked and received permission to file briefs in behalf of the petitioners. The claim is made by these States that under Section 35 of the Leasing Act (pp. 48–49, *infra*) the State is to receive 37½% of the royalties accruing to the Government from production of oil and gas on public lands within that State.

This gratuity depends on the contingency of discovery. There is not appropriated to these States any specific or definite sum, but the Act gives to the States 37½% of the amounts realized under oil and

gas leases, *if, as, and when received by the United States from such leases.* Consequently there is nothing due to the States until something is earned and received. That the donation is not based upon any *vested right* in the States is shown by the fact that in Section 35 of the Leasing Act all moneys accruing to the United States from oil and gas leases in the naval petroleum reserves are required to be deposited in the Treasury of the United States and retained by the United States.

The briefs in support of the contentions of the States upon their contingent claims add nothing to the argument and citations presented by the parties to the action, and therefore need no discussion here.

Assuming, as we contend, that the President possessed the power to withdraw public lands from the operation of the oil and gas provisions of the Leasing Act, the exercise of such power here involved should not be declared invalid because of informality, or even because the President and the Secretary may have mistaken the source of the power which they sought to exercise in the public interest. The acts of these executive officers, undertaken in the public welfare, involving considerations of enormous economic importance—tacitly approved, as they were, by the acquiescence of Congress—should not be set aside unless the existence of all power can be successfully denied.

We submit that the petitioners have not made out such a clear case of error upon the part of the President and Secretary as to warrant the arrest of the executive action by mandamus.

CONCLUSION

We respectfully submit that the judgments of the Court of Appeals should be affirmed.

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APRIL, 1931.

APPENDIX A

STATUTES, REGULATIONS, AND DEPARTMENTAL ORDERS INVOLVED

The Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 441, 442, 443, 450, so far as it relates to oil and gas, provides, in part:

> *Be it enacted* * * * That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and, in the case of coal, oil, oil shale, or gas, to municipalities: * * * *And provided further*, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act. (U. S. C., Title 30, Sec. 181.)

13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. * * * Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument,

stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. * * * (U. S. C., Title 30, Sec. 221.)

14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: * * *. (U. S. C., Title 30, Sec. 223.)

16. That all permits and leases of lands containing oil or gas, made or issued under the provisions of this Act, shall be subject to the condition that no wells shall be drilled within two hundred feet of any of the outer boundaries of the lands so permitted or leased, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners, and to the further condition that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits. Violations of the provisions of this section shall constitute grounds for the

forfeiture of the permit or lease, to be enforced through appropriate proceedings in courts of competent jurisdiction. (U. S. C., Title 30, Sec. 225.)

32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (U. S. C., Title 30, Sec. 189.)

35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the

construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: * * *. (U. S. C., Title 30, Sec. 191.)

The Withdrawal Act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497, provides:

1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (U. S. C., Title 43, Sec. 141.)

2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands

made prior to June twenty-fifth, nineteen hundred and ten: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (U. S. C., Title 43, Sec. 142.)

3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

General Land Office Circular No. 672, promulgated on March 11, 1920, under Section 32 of the Act of February 25, 1920, provides in part (47 L. D. 437, 438):

> It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.

Order No. 337, of the Department of the Interior, promulgated March 16, 1929, provides:

> The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.
>
> There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.
>
> Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.
>
> Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.
>
> With regard to the 20,000 outstanding permits on public lands, the Department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the Solicitor of the Department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint-drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929.

(Signed) RAY LYMAN WILBUR,
Secretary.

Order No. 338, of the Department of the Interior, promulgated March 20, 1929, provides:

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to deter-

mine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights; or question of similar character, they

should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy; otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

APPENDIX B

DEPARTMENT OF THE INTERIOR PRESS RELEASES

On March 13, 1929, the Department of the Interior released the following memorandum to the press (No. 618, R. 3–4; No. 704, R. 5–6):

Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further appli-

cations for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.

These instructions are in accordance with the statement issued at the White House yesterday to the effect that "there will be complete conservation of Government oil in this administration."

Permits to prospect for oil and leases of land for its development have in the past been issued under the act of February 25, 1920. That act states "that the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe to grant to an applicant qualified under this act a prospecting permit."

The General Land Office, in its Circular No. 672, says: "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

On March 16, 1929, the Department of the Interior released the following memorandum to the press (No. 618, R. 4–5, 18–19; No. 704, R. 7–9):

Secretary Ray Lyman Wilbur, of the Department of the Interior, to-day issued a departmental order appointing a committee of three to pass upon outstanding permits to prospect for oil and gas on Government lands and to make recommendations as to which of those permits should be canceled. The members of that committee are the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. The order

also lays down the general policy with relation to these permits to be followed by the department. In detail it follows: [Here followed Order No. 337, pp. 51, 52, *supra.*]

APPENDIX C

EXTRACTS FROM REPORTS OF CONGRESSIONAL COMMITTEES IN REGARD TO THE BILL WHICH BECAME THE WITHDRAWAL ACT OF JUNE 25, 1910, c. 421, 36 STAT. 847

Senate Report 171, 61st Cong., 2d Sess., is in part as follows:

> The power conferred upon the President by the proposed substitute is a power that he has possessed and exercised almost from the inception of our public-land system and is a power that he still possesses and exercises.
>
> * * * * *
>
> The statutes cited, as well as the decisions of the court above referred to, and other decisions that might be cited, as well as the opinions of the Attorneys General, all go to show that the President of the United States has the inherent power to reserve for public purposes lands of the United States from location, sale, or entry.
>
> It is only lately that this power has been doubted and questioned, and the object of the proposed substitute is to make it definite and clear beyond all dispute that the President possesses this power of withdrawal. The only change in existing law, as interpreted by the courts, is that part of the proposed substitute which provides that the "Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

House Report 983, 61st Cong., 2d Sess., being the report of the majority, contains the following:

> This bill grants to the President authority to withdraw from location, settlement, filing, and entry public lands, first, for public uses; second, for examination and classification to aid in administering the existing law; third, to conserve the public domain pending legislative action when in the judgment of the President public interest requires it.
>
> The President has authority to withdraw lands for certain purposes, but there is a difference of opinion as to the extent of that authority. Many claim this authority is as broad as that provided for in this bill; others contend to the contrary. No statute has been found expressly conferring this authority, and the extent thereof has not been settled by the Supreme Court.
>
> During the past few years large areas of the public domain have been withdrawn for classification and submission to Congress of recommendations of legislation relative thereto with a view of protecting and conserving public interest in valuable oil, coal, and other mineral land, water-power sites, etc. Since some of the withdrawals attempts have been made by different parties to appropriate land so withdrawn, upon the theory that the withdrawals were unauthorized. Hence the provision in the bill ratifying and confirming prior withdrawals. In view of the conflicting opinions that exist as to the authority for past and future withdrawals, it is deemed necessary to adopt a measure that will clearly define the extent of such authority. The importance of this legislation in aid of conserving such resources for the people is too manifest to require comment.

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